

An Overview of The Court-Martial Process & MRE 514

Marine Corps TCAP



Class Agenda



- 1) Overview of Court Martial Process
 - Process/types/anatomy of courts-martial
 - Role of the actors: trial counsel (prosecutor), defense counsel, victim legal counsel, military judge, court-martial members (the jury)
- 2) MRE 514

Getting Started



- Investigation ≠ Court-Martial
- An alleged sexual assault (or other misconduct) DOES NOT start the court-martial process.
- The court-martial process begins when a command submits a request for legal services (RLS) to the law center/LSSS.

From RLS to Referral



- Once the law center receives an RLS, the trial counsel processes the case and, if warranted, prefers charges.
 - Trial Counsel should contact victim for interview. Victim Advocate involved and may be present if victim requests.
- Article 32 Preliminary Hearing (req for GCM only)
 - In most cases victim will not testify.
 - Preliminary Hearing Officer makes report and recommendation
- Convening Authority may refer charges to CM.

Types of Courts-Martial



- General Court-Martial
 - Felony “Equivalent” Conviction
 - Max Punishment varies by UCMJ Article
- Special Court-Martial
 - Misdemeanor “Equivalent” Conviction
 - Max Punishment: 1 year confinement, reduction in rank to E-1, forfeitures of 2/3 pay per month for 1 year
- Summary Court-Martial
 - Not a Criminal Conviction (normally)
 - Max Punishment: 30 days confinement, reduction in rank, forfeitures of 2/3 pay for 1 month

Trial Process / Anatomy



- Voir Dire
- Opening Statements
- Government's case-in-chief*
- Defense case-in-chief*
- Government rebuttal case*
- Closing statements
- Verdict
- Presentencing
- Sentence

* Victim may NOT be excluded from the court-room without a hearing

Pre-trial 39a Sessions



- Motions concerning the victim
 - Military Rule of Evidence 412 – Victim's past sexual behavior generally NOT admissible.
 - Exceptions: 1) other source of injury;
2) other acts w/ accused; and
3) constitutionally required.
 - E-mail, Phone Records, Facebook, etc.
 - SART examination evidence (statement, photos)
- Difference between discovery and evidence

Pre-trial Agreements (PTA)



- “PTA” is the military version of a plea bargain
 - Accused (most commonly) agrees to plead guilty and forfeit some rights otherwise afforded in court-martial process
 - Convening Authority agrees to limit accused’s exposure to types of punishment and other miscellaneous protections as negotiated
- Victims have the right to consult with Government prior to a Convening Authority agreeing to PTA

Verdict and Sentence



- Verdict – “not guilty” ≠ innocent
 - A verdict of “not guilty” simply means that the government did not prove its case ***beyond a reasonable doubt*** (highest standard of proof known to law).
- Sentence
 - 5 principals reasons of sentencing:
 1. Protection of society from the wrongdoer;
 2. Punishment of the wrongdoer;
 3. Rehabilitation of the wrongdoer;
 4. Preservation of good order and discipline in the military;
 5. General and specific deterrence.
 - Victim allowed to **testify** or may be allowed to submit a victim-impact statement regarding how the incident affected her/him.

Role of the Trial Counsel



- Trial Counsel (prosecutor) is not a victim advocate
- What can the victim expect from the trial counsel?
 - Respect and dignity
 - Keep the victim informed
 - Refer the victim to locally available assistance
 - Explain court-martial process
 - Thoroughly prepare the victim for trial
- Direct examination
 - Detailed account of incident/aftermath
 - Can take a long time (often more than 2 hours)

Role of the Defense Counsel



- The mission of the defense counsel is to zealously advocate for his client.
- What can the victim expect from the defense counsel?
 - Interviews (VA can be present)
 - Requests for information
 - Inquiries to command, friends, coworkers, family
 - Defense Investigator?
 - Should expect him/her to act like a Marine Officer
- Cross-examination
 - Confrontational
 - Goal is to expose inconsistencies and damage credibility

Role of the Military Judge



- The military judge will be an officer (Major – Col) with trial experience.
- The Military Judge does not take sides, referee.
- Ultimate goal is to conduct a fair and impartial trial, wherein the constitutional rights of both victim and accused are protected.
 - Rights of the accused are paramount.
 - Respect for the victim is an important concern.

Members (a.k.a. The Jury)



- Members are drawn from the local population of officers/enlisted.
 - Must be senior to the accused.
 - Enlisted cannot be from the command (company/squadron) of the accused.
 - Members are “***best qualified for duty by reason of their age, education, training, experience, length of service, and judicial temperament.***” (Art 25 criteria)
 - Could ultimately be from the command of the victim.

MRE 514

Victim Advocate – Victim Privilege

Background

- Executive Order 13593
 - Signed 13 Dec 2011
 - Effective 30 days from EO date
 - 12 January 2012

The Privilege

“A **victim** has a **privilege** to **refuse to disclose** and to **prevent any other person** from disclosing a **confidential communication** made between the **victim** and a **victim advocate**, in a **case arising under the UCMJ**, if such communication was made for the purpose of **facilitating advice or supportive assistance** to the victim.”

Who Claims Privilege?

- Victim
 - Any person who suffered direct physical or emotional harm as the result of a sexual or violent offense
- Guardian or Conservator of Victim
- Trial Counsel (if authorized by victim)
- Defense Counsel (if representing & authorized by victim)

Who Claims Privilege?

- **Victim Advocate** who received communication
 - Designated in writing as a VA OR
 - Authorized to perform VA duties IAW service regulations, and is acting in the performance of those duties OR
 - Certified as a VA pursuant to Federal or State requirements
- Authority to assert privilege is presumed in absence of evidence to the contrary

What Info is Protected?

- Confidential Communications
 - Communication made to a VA acting in the capacity of a VA AND
 - Not intended to be disclosed to third persons other than...
 - Those to whom disclosure is made in furtherance of the rendition of advice or assistance to the victim OR
 - An assistant to a VA
- Must be a case **arising under UCMJ**
 - When assailant is civilian, victim's records *probably* not privileged
- Must be made for the purpose of facilitating
 - Advice OR
 - Supportive assistance to the victim

Exceptions – 514(d)

- There is no privilege when
 - The victim is **dead**
 - Federal/State law or Service regulation impose **duty to report** information contained in the communication
 - Communication clearly contemplated the **future commission of a fraud or crime**

Exceptions – 514(d)

- The VA services are sought or obtained to **enable or aid** anyone to **commit or plan to commit** what the victim knew or reasonably should have known to be a **crime or fraud**
- **Necessary to ensure safety & security** of military personnel, military dependants, military property, classified information, or accomplishment of a military mission
- **Necessary to ensure safety of any other person** (including the victim) when a VA believes that **victim's mental or emotional** condition makes the victim a danger
- Admission or disclosure is **constitutionally required**

MRE 514 – Judicial Process

- Evidence is known or suspected to exist
- Dispute about disclosure, admissibility, or use of evidence (testimony, records, etc)
- Seek interlocutory (preliminary, no finder of fact) ruling from the military judge by filing a motion and allowing opposing party to respond (victim has opportunity to be heard)
- 39(a) court session, can be closed due to privacy concerns

MRE 514 – Judicial Process

- Witness testimony and presentation of evidence that is necessary to decide the issue at hand
- Military judge can review evidence in camera (by himself) in order to preserve confidentiality
- Military judge can limit use or issue protective order to prevent unnecessary disclosure
- Portions of the record of trial (motion, related papers, etc.) shall be sealed unless military judge or appellate court orders otherwise

MRE 514 – Reporting

- MRE 514 **does not change** the unrestricted reporting process
- NCIS, law enforcement, JAs, and the chain of command **are not VAs and are not covered** by the MRE 514 privilege
- Victim who first makes a restricted report and then decides to make an unrestricted report *can* claim MRE 514 privilege with regard to communications to a VA

MRE 514 – Takeaways

- No longer a “free for all” WRT victim’s records and testimony by SARC or VA at trial
- Privilege is limited to certain situations
 - Likely covers the vast majority of normal VA-victim interaction
- Privilege is not absolute
 - Portions of records/testimony may be released (e.g., if Military Judge determines accused has need in order to meaningfully confront victim due to contradictory statements)

MRE 514 – Takeaways

- Trial Counsel **are not covered**, but victim can authorize a TC to claim privilege on their behalf (MRE 514 (c))
- Legal assistance attorneys **are not covered** (MRE 514 (b)(3)), but victim and LA attorney may have attorney-client privilege (depends on type of communication)
- VA-V privilege **does not protect all communication**, such as: exculpatory information, information about future crimes or for the safety of victim, military personnel, dependents, or property (MRE 514 (d) (2), (3) and (4))

MRE 514 – Takeaways

- Inform victim of privilege, but clearly discuss the potential that their records could get released
- Privilege operates similarly to MRE 513 (Psychotherapist-Patient Privilege)

MRE 514 – Hypothetical #1

- Defense Counsel calls Victim Advocate and says “I’d like to set up a time to interview you about what the victim discussed with you.”

MRE 514 – Hypothetical #2

- Defense Counsel is interviewing victim and says “I heard that you told the victim advocate the accused probably couldn’t tell how drunk you were the night of the assault.”

QUESTIONS?

